Filed 11/14/03 P. v. Buster CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM REED BUSTER,

Defendant and Appellant.

F039562

(Super. Ct. No. 1011409)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. John E. Griffin, Jr., Judge.

Carol A. Navone, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Susan J. Orton, Deputy Attorneys General, for Plaintiff and Respondent.

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FACTUAL AND PROCEDURAL BACKGROUND

During a fistfight, William Reed Buster pulled out a knife and stabbed his adversary, who after neurosurgery still feels pain in his arm but feels nothing in his hand.

A jury found Buster guilty of mayhem and assault with a deadly weapon. (Pen. Code, §§ 203, 245, subd. (a)(1).)

DISCUSSION

A. Advice About Self-Representation

Buster argues that inadequate advice from the court about the dangers and disadvantages of self-representation compel reversal of the judgment. The Attorney General argues the contrary.

1. The record

At a *Marsden*[1] hearing just before the preliminary hearing, the court heard Buster articulate his frustration with his counsel's delay in securing hospital records about blood work that could "prove that the supposed victim was under the influence of drugs and alcohol." His counsel replied that he and Buster had discussed his defense of self-defense and that he was awaiting records the prosecutor had subpoenaed from a San Francisco hospital but that he did not know if that hospital had done any blood work. Finding that "there is still some investigative work being done," the court denied the motion.

Two months later, at a *Marsden* hearing on the eve of trial, the court heard Buster characterize his problems with his counsel as having risen to the level of "deception, breach of trust and lack of trust." He complained of three time waivers his counsel had forced on him and insisted on his right to a speedy trial. He criticized his counsel's failure to do investigative blood work that could "prove the level and presence of drugs and alcohol as part of [his] defense." He said his adversary had partied "throughout the day and late into the night" and could not have gone into surgery after the fight without "some kind of blood test." He said his intent was to prove his adversary was under the

[1] *People v. Marsden* (1970) 2 Cal.3d 118.

influence of "a variety of other drugs" besides alcohol. He cited federal case law on his right to the effective assistance of counsel.

Buster's counsel replied that he did not know why his investigator had not yet spoken with Buster. He said that the police reports did not indicate whether there was preserved blood the defense could test and that he was still awaiting the hospital records the prosecutor had subpoenaed. He apologized to the court for not having Buster's file with him in court and said an employee of his office was "keep[ing] an eye out" for the file, which had disappeared from his office. The court found that counsel had not adequately prepared a defense and granted Buster's *Marsden* motion.

Buster immediately informed the court of his intent "to invoke [his] right to go pro per" and not "to put it off" since he had "a life [he] intend[ed] to get back to." The court inquired if he actually wanted to go to trial even though the court had just made a finding that his counsel had not properly prepared the case for trial. Buster replied, "Your Honor, I am properly prepared for trial. [Counsel] is not. I invoke my right to go pro per." "That's all well and good, sir," the court said, "and you have a right to do that provided that you understand what you're doing." "I understand what I'm doing," Buster replied. "Please grant me my wishes, Your Honor."

Instead of granting Buster's request, the court inquired further:

> "THE COURT: … With reference to the Faretta[2] motion, Mr. Buster, I'm having a real problem with this. First of all, you've indicated you're not a lawyer, right?
>
> "[BUSTER]: No, Your Honor, but I do have common sense.
>
> "THE COURT: Okay. And you had no formal training in law?
>
> "[BUSTER]: No, but I do know people and I do know the truth.

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[2] *Faretta v. California* (1975) 422 U.S. 806.

"THE COURT: And are you familiar with what objections to make to testimony that is in the courtroom that might be objectionable on legal grounds?

"[BUSTER]: If it doesn't have any relevance to the case, Your Honor, and I'm sure a lot of this won't. I did ask the court there is a corollary, right, of that motion and it does mention stand-by counsel for those purposes, but you know what, Your Honor? I'm prepared to proceed with an investigator.

"THE COURT: Well, that's another problem because if we relieve the Public Defender's Office, that was their investigator that's supposedly been working on your case, and I'm not sure whether the court can tell that investigator to continue. I suppose we can have [Buster's former counsel] as advisory counsel and him as investigator, I suppose.

"[BUSTER]: That would be fine with me, Your Honor, if [Buster's former counsel] would agree.

"[BUSTER'S FORMER COUNSEL]: My understanding from the past is our office has declined to be advisory counsel.

"THE COURT: Okay.

"[BUSTER'S FORMER COUNSEL]: I think it's our policy at this time.

"THE COURT: Okay."

After a brief interlude, the court continued its *Faretta* inquiry:

"THE COURT: Mr. Buster, one of the reasons that I granted your motion was that you had indicated something about the blood work here and that you had not received copies of—well, that there was no knowledge as to whether or not there was a blood sample that had been retained in this case. Nobody had seen the results of the hospital blood work so nobody knew what blood work had been done and nobody knew what substances were or were not detected by that blood work. Nobody knew whether there was any blood retained that could be worked on now. None of those things are going to become real apparent, I don't think, in time for any meaningful reaction by the time your trial comes up. Do you understand that?

"[BUSTER]: Yeah, Your Honor. I do understand it.

"THE COURT: Well, do you understand that—are you saying that you—

"[BUSTER]: I will proceed with trial, Your Honor.

"THE COURT: You're going to proceed with trial regardless of that fact?

"[BUSTER]: Yes. I would hope that those things become evident, but if not, I'll perhaps file motions on it, and if I have to I can rely on Officer Perdine (phonetic) I believe he is.

"[THE PROSECUTOR]: If there's any witnesses that the defendant, Mr. Buster, needs, I have an investigator. He's available today. That would facilitate—

"[BUSTER]: I think I can use the court transcripts, Your Honor.

"THE COURT: Okay. Well, all right. Do you understand, Mr. Buster, you have a very serious case here which, as I understand it, is—we calculated a maximum on this.

"[THE PROSECUTOR]: Two—well, it's a Three Strikes case. I think 26 years plus to life.

"THE COURT: Right. So you're absolutely sure that you want to represent yourself in this situation, sir?

"[BUSTER]: Yes. I am absolutely certain.

"THE COURT: And you're also certain that you don't want any kind of a continuance for purposes of getting better prepared for trial?

"[BUSTER]: No, sir. I do not wish to continue.

"THE COURT: Okay. I'll allow the defendant his right."

2. The law

The accused has a Sixth Amendment right of self-representation if he or she knowingly, intelligently, and voluntarily waives his or her Sixth Amendment right to the assistance of counsel. (*Faretta v. California*, *supra*, 422 U.S. at pp. 812-835; *People v. Barnum* (2003) 29 Cal.4th 1210, 1214.) In *Faretta*, the trial court warned the accused, a "literate, competent, and understanding" (*Faretta*, at p. 835) high school graduate who had defended himself once before in a criminal prosecution, that if he were to represent

himself he would have to follow "all the 'ground rules' of trial procedure" (*id.* at p. 836), that only someone who had tried "'a lot of cases'" (*id.* at p. 808, fn. 2) would know, that he "would receive no special favors," (*id.* at p. 808) and that he would be "'making a mistake'" (*ibid.*). After the trial court forced a public defender on him, the high court reversed, holding that even though the accused "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he [or she] knows what he [or she] is doing and his choice is made with eyes open,'" (*id.* at p. 835) the court must honor the choice of self-representation "out of 'that respect for the individual which is the lifeblood of the law.'" (*Id.* at p. 834; see *Barnum*, at p. 1226.)

The test of "whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Although the accused can challenge the grant of a motion for self-representation by arguing that the record fails to show he or she was made aware of the risks of self-representation, no particular form of words of admonishment is required. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070; *People v. Bloom* (1989) 48 Cal.3d 1194, 1225.) To the contrary, the test is simply "whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*Koontz*, at p. 1070; *Bloom*, at p. 1225.)

Congruently, the prevailing test in the federal circuit courts for a valid waiver of the right to counsel is a "similar nonformalistic approach to determining sufficiency of the waiver from the record as a whole rather than requiring a deliberate and searching inquiry." (*U.S. v. McDowell* (6th Cir. 1987) 814 F.2d 245, 249, disapproved on another ground in *Godinez v. Moran* (1993) 509 U.S. 389, 395, fn. 5.) "We prefer trial courts to simplify our review by explaining the risks of self-representation to the accused," the Ninth Circuit notes. (*United States v. Kimmel* (9th Cir. 1982) 672 F.2d 720, 722.)

"However, because the test concerns what the accused understood rather than what the court said or understood, explanations are not required." (*Ibid*.) "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." (*Fitzpatrick v. Wainwright* (11th Cir. 1986) 800 F.2d 1057, 1065.)

Here, the colloquy that the court instigated before ruling on Buster's *Faretta* motion informed him that he would have to make legal objections to testimony, cautioned him that if refused to waive time he would probably go to trial without the blood work he had sought, warned him that if he were to represent himself neither his former counsel nor his former counsel's investigator would be able to assist him, and emphasized that if the jury were to find him guilty he would face a life sentence under the three strikes law. Even though that colloquy made him aware of the dangers and disadvantages of self-representation, he insisted on proceeding in propria persona. Since the record establishes that he knew what he was doing and that he made his choice with eyes open, the court committed no error by honoring his choice of self-representation "out of 'that respect for the individual which is the lifeblood of the law.'" (*Faretta v. California*, *supra*, 422 U.S. at p. 834; *People v. Barnum*, *supra*, 29 Cal.4th at p. 1221.)[3]

B. Testimony About Prison

Buster argues that his adversary's testimony that Buster had told him he had been in prison prejudiced him. The Attorney General argues the contrary.

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[3]In a footnote in appellant's opening brief, rather than in a separate motion, Buster requests we take judicial notice that a certain date fell on a certain day of the week. For failure to comply with applicable rules of court, we deny his request. (See Cal. Rules of Court, rules 22(a)(1) ["To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order"], 30 ["The rules governing appeals from the superior court in civil cases shall be applicable to appeals from the superior court in criminal cases except where express provision is made to the contrary, or where the application of a particular rule would be clearly impracticable or inappropriate"].) Even if he had made a proper request that we had granted, we would not have decided the issue differently.

1. The record

Although the court bifurcated the issue of the priors and ordered "no mention of the priors" at trial, Buster's adversary testified on recross-examination that Buster had told him he had been in prison:

"BY MR. BUSTER:

"Q At no time you felt threatened by me?

"A No, I did not.

"Q Do you remember the statement here you made to the Modesto Police Department, 'I didn't even know the guy'?

"A I never met you until that day for reals.

"Q Just met me that day. You had one conversation with me throughout the whole day?

"A Yes.

"Q And during that conversation I told you that I was—

"A In prison.

"THE COURT: That's going beyond the questions he was asked on redirect. Just confine your questions to those answers that he gave.

"THE WITNESS: You didn't scare me."

Buster neither objected nor requested an admonition.

2. The law

Preliminarily, Buster argues that his failure to object or to request an admonition is excusable "because both would have been futile." A "well-established procedural principle" generally precludes appellate review of "claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) "[S]trong policy reasons" underlie that principle: "It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial

court, could have been easily corrected or avoided." (*Id*. at p. 276.) Here, we see no justification for departing from the established rule.

Even if we were to adjudicate Buster's argument on the merits, we would deny relief. His adversary testified not to anything he knew personally but only to something Buster had told him. The jury had no way of knowing if Buster had told him that to inform him of a fact or to intimidate him with a fiction. Even without an objection or a request for an admonition, the court admonished Buster to limit his questions on recross to the scope of the prosecutor's questions on redirect so as to preclude a return to that topic. The court's admonition apparently worked, as Buster cites nothing in the record showing that the jury heard anything else, in evidence or argument, about that topic. (Cf. Cal. Rules of Court, rule 14(a)(1)(C) & (a)(2)(C).) An isolated remark by a witness about the accused having been in prison is not necessarily prejudicial. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1059-1060, reversed on another ground in *Stansbury v. California* (1994) 511 U.S. 318, 325-327.)

C. Enhancement And Fines

Buster argues, the Attorney General agrees, and we concur that since his serious felony priors were not "brought and tried separately" the court should have imposed one enhancement rather than two. (Pen. Code, § 667, subd. (a)(1).) The record shows, and the parties agree, that the court imposed two fines—a Penal Code section 1202.4, subdivision (b)(2) restitution fine and a Penal Code section 1202.45 additional restitution fine—at the rate of $200 per year for each determinate year of the aggregate sentence. We will remand the case to superior court with directions to strike from the aggregate sentence of 38 years to life the five-year term on one Penal Code section 667, subdivision (a)(1) enhancement, to impose an aggregate sentence of 33 years to life, to vacate both fines, each in the amount of $7,600, and to impose both fines, each in the amount of $6,600.

DISPOSITION

We affirm the judgment and remand the case to superior court with directions to strike from the aggregate sentence of 38 years to life the five-year term on one Penal Code section 667, subdivision (a)(1) enhancement, to impose an aggregate sentence of 33 years to life, to vacate the Penal Code section 1202.4, subdivision (b)(2) restitution fine and the Penal Code section 1202.45 additional restitution fine, each in the amount of $7,600, to impose a Penal Code section 1202.4, subdivision (b)(2) restitution fine and a Penal Code section 1202.45 additional restitution fine, each in the amount of $6,600, and to issue and to forward to the appropriate persons an abstract of judgment so amended. Buster has no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.)

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GOMES, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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LEVY, J.